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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT TACOMA

9                   PACTOOL INTERNATIONAL LTD.,

10                  Plaintiff,

11                  v.

12                  KETT TOOL COMPANY, INC., et al.,

13                  Defendants.

14                  CASE NO. C06-5367BHS

15                  ORDER GRANTING IN PART  
16                  AND DENYING IN PART  
17                  KETT'S MOTION FOR  
18                  RECONSIDERATION AND  
19                  DENYING KETT'S MOTION  
20                  FOR LEAVE TO  
21                  SUPPLEMENT THE RECORD

22                  This matter comes before the Court on Defendant Kett Tool Company Inc.'s  
23                  ("Kett") motion for reconsideration (Dkt. 160) and motion for leave to supplement the  
24                  record (Dkt. 204). The Court has reviewed the briefs filed in support of and in opposition  
25                  to the motion and the remainder of the file and hereby grants in part and denies in part the  
26                  motion for reconsideration and denies the motion for leave to supplement the record for  
27                  the reasons stated herein.

28                  **I. PROCEDURAL HISTORY**

29                  On June 29, 2006, Plaintiff PacTool International Ltd. ("PacTool") filed a  
30                  complaint against Kett alleging patent infringement. Dkt. 1.

31                  On December 20, 2007, Kett filed a motion to stay proceedings. Dkt. 30. On  
32                  January 11, 2008, Kett submitted a letter in support of its motion to stay the proceedings.  
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1 Dkt. 37, Declaration of John Paul Davis, Exh. B (“Letter”). On January 18, 2008,  
2 PacTool moved to strike the Letter. Dkt. 38. On February 1, 2008, the Court granted the  
3 stay and denied PacTool’s motion to strike. Dkt. 39.

4 On April 8, 2010, PacTool filed a First Amended Complaint (“FAC”) against  
5 Defendants Kett and H. Rowe Hoffman alleging patent infringement. Dkt. 63. On July 6,  
6 2010, Kett informed the Court of the death of Mr. Hoffman. Dkt. 94. On July 14, 2010,  
7 Kett answered and asserted numerous affirmative defenses, including laches, equitable  
8 estoppel, implied license, and waiver. Dkt. 95.

9 On October 6, 2010, PacTool filed a Motion for Substitution of Elizabeth Tu  
10 Hoffman, Executor for H. Rowe Hoffman. Dkt. 108. On October 26, 2010, PacTool  
11 served Mrs. Hoffman (“Hoffman”). Dkt. 116. On December 6, 2010, the Court granted  
12 PacTool’s motion to substitute. Dkt. 121.

13 On December 7, 2010, PacTool filed a Motion for Summary Judgment as to  
14 Certain Affirmative Defenses. Dkt. 123. On December 27, 2010, Kett responded and  
15 failed to submit any admissible evidence in support of its positions. Dkt. 133. On  
16 December 31, 2010, PacTool replied. Dkt. 134.

17 On December 20, 2010, Kett and Hoffman (“Defendants”) filed a Motion to  
18 Dismiss or Transfer. Dkt. 132.

19 On January 31, 2011, the Court granted PacTool’s motion for summary judgment  
20 because Kett “failed to present evidence of any kind in support of its defenses.” Dkt. 149  
21 at 5. The Court also held that the order applied to the affirmative defenses of both Kett  
22 and Hoffman because Hoffman’s estate was “simply substituted in place of [Mr.]  
23 Hoffman following his death. *Id.* at 5.

24 On February 14, 2011, Kett filed a motion for reconsideration and submitted  
25 documents in support of its position. Dkt. 160. On March 8, 2011, the Court requested a  
26 response from PacTool and set a briefing schedule. Dkt. 174. On March 21, 2011,  
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1 PacTool responded. Dkt. 193. On March 25, 2011, Kett replied and submitted additional  
2 documents in support of its position. Dkt. 198. On March 29, 2011, PacTool filed a  
3 surreply. Dkt. 202.

4 On March 31, 2011, Kett filed a motion for leave to file a sur-surreply. Dkt. 204.  
5 On April 11, 2011, PacTool responded. Dkt. 208. On April 15, 2011, Kett replied. Dkt.  
6 212. Kett did not file a surreply.

7 On March 3, 2011, the Court denied Defendants' motion to dismiss. Dkt. 165. On  
8 March 21, 2011, Hoffman answered the FAC and asserted numerous affirmative  
9 defenses, including laches, equitable estoppel, implied license, and waiver. Dkt. 192. On  
10 March 28, 2011, the Court received notice from the United States Court of Appeals for  
11 the Federal Circuit that Hoffman had filed a Writ of Mandamus. Dkt. 200.

## II. DISCUSSION

### A. Sur-Surreply

15 "No response [to a surreply] shall be filed unless requested by the court." Local  
16 Civil Rule 7(g)(4). The Court did not request a response. Therefore, Kett's motion for  
17 leave to file a sur-surreply is denied.

### B. Reconsideration

19 Motions for reconsideration are governed by Local Rule CR 7(h), which provides  
20 as follows:

21 Motions for reconsideration are disfavored. The court will ordinarily deny  
22 such motions in the absence of a showing of manifest error in the prior  
23 ruling or a showing of new facts or legal authority which could not have  
been brought to its attention earlier with reasonable diligence.

24 Local Rule CR 7(h)(1).

#### 1. Hoffman

26 In this case, the Court granted summary judgment on affirmative defenses that  
27 Hoffman may have, and eventually did (Dkt. 192), assert. Dkt. 149 at 3. PacTool argued  
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1 that the Court should preclude Hoffman as well as Kett from asserting certain defenses  
2 because Hoffman would not be presenting any evidence that Kett would not be  
3 presenting. Dkt. 123 at 1-2. The Court finds that its ruling as to Hoffman was premature  
4 because, at the time of the ruling, Hoffman had neither answered the FAC nor had  
5 participated in discovery. Moreover, no attorney had appeared on behalf of Hoffman.

6 Therefore, the Court vacates its previous order as to Hoffman and denies without  
7 prejudice PacTool's motion for summary judgment against this Defendant.

8 **2. Kett**

9 In this case, Kett argues that the evidence it relied upon in support of its opposition  
10 was already part of the record. Dkt. 160 at 5-7. The Court agrees with Kett. The Court  
11 finds, however, that the Letter only creates material questions of fact with regard to Kett's  
12 affirmative defenses of laches and equitable estoppel. The defense of waiver requires  
13 intent and the defense of implied license requires an affirmative grant of consent or  
14 permission. *See* Dkt. 134 at 12-16 (citing cases). Therefore, the Court grants Kett's  
15 motion for reconsideration in part, vacates its previous order in part, and denies PacTool's  
16 motion for summary judgment in part on the affirmative defenses of laches and equitable  
17 estoppel.

19 **III. ORDER**

20 Therefore, it is hereby **ORDERED** that Kett's motion for leave to file a sur-  
21 surreply (Dkt. 204) is **DENIED** and Kett's motion for reconsideration (Dkt.133) is  
22 **GRANTED in part and DENIED in part** as follows:

- 23 1. The Court **VACATES** its previous order (Dkt. 149) as to Hoffman and  
24 **DENIES without prejudice** PacTool's motion for summary judgment  
25 (Dkt. 123) as to Hoffman;

- 1       2. The Court **VACATES** its previous order (Dkt. 149) as to Kett's defenses of  
2 laches and equitable estoppel and **DENIES** PacTool's motion for summary  
3 judgment (Dkt. 123) as to these defenses;  
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5       3. The Court **DENIES** the remainder of the motion.

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6 DATED this 31st day of May, 2011.  
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1       BENJAMIN H. SETTLE  
2       United States District Judge